IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 795

BANKERS TRUST COMPANY, as Trustee, *et al.*,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION OF BANKERS TRUST COMPANY, AS TRUSTEE, *ET AL.* FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JESSE E. WAID,
WALTER H. BROWN, JR.,
ELBERT N. OAKES,
HAROLD L. FIERMAN,
Counsel for Petitioners.

Dated, January 31, 1946.

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Bankers Trust Company, Trustee, The New York Trust Company, Trustee, Raymond L. Gebhardt and Ferdinand J. Sieghardt, Debtor's Trustees and Independent Group of Bondholders, Petitioners herein, respectfully pray for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit entered November 5, 1945 (R. 121),* and the order entered thereon (R. 128) which affirmed an order of the United States District Court for the Southern District of New York (R. 6), entered in proceedings to reorganize the New York, Ontario & Western Railway Company, Debtor, under Section 77 of the National Bankruptcy Act, as amended. The latter order was entered

* (R.) with a numeral denotes a page reference to the Transcript of Record in the Circuit Court of Appeals, Second Circuit.

pursuant to the opinion of the District Court, dated March 13, 1945 (R. 12), where the Court held that the lien of The People of the State of New York, (herein called the "State"), for money advanced to the Debtor in the elimination of grade crossings, enjoyed priority over the lien of pre-existing mortgages on the Debtor's property.

Opinions Below.

The opinion of the District Court (R. 12) is not reported; the opinion of the Circuit Court of Appeals (R. 121) is reported in 151 F. (2d) 802. (*State of New York* v. *Gebhardt, et al.*)

Jurisdiction.

The Circuit Court of Appeals entered its order for mandate on November 5, 1945. (R. 128) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A. §347(a))

Summary Statement of Matters Involved.

This petition involves the question whether the lien of the State of New York for money advanced to the Debtor to finance grade crossing eliminations may constitutionally outrank pre-existing mortgage liens on the Debtor's property where the statute creating the State's lien contained no provision for notice thereof to mortgagees and where no such notice was in fact given to mortgagees. The constitutional question was expressly raised in the pleadings of the Mortgage Trustees (R. 21, 71, 72, 73) and presented to the District Court and to the Circuit Court of Appeals.

Facts.

1. Bankers Trust Company, one of the Petitioners herein, is Trustee under the Debtor's Refunding Four Per Cent Gold Mortgage, dated June 1, 1892. (R. 49)

2. The New York Trust Company, one of the Petitioners herein, is Trustee under the Debtor's General Four Per Cent Gold Mortgage, dated May 31, 1905. (R. 49)

3. The District Court of the United States for the Southern District of New York in its opinion dated March 13, 1945 (R. 12, 20) directed the entry of an order conferring upon the State's claim priority over the mortgages hereinabove mentioned and denying the contention of the Mortgage Trustees that the Grade Crossing Elimination Act was unconstitutional if construed to require the subordination of said mortgage liens.

4. The order entered on April 25, 1945 (R. 6) decreed that the priority of the State's lien over the mortgages applied both to instalments past due (R. 8, 9) and to future instalments (R. 10), and rejected the contention of unconstitutionality referred to in "3" above.

5. The opinion of the Circuit Court of Appeals for the Second Circuit affirmed the District Court's order. (*State of New York* v. *Gebhardt, et al.*, 151 F. (2d) 802.)

6. The State acquired its lien under the provisions of the Grade Crossing Elimination Act (Chapter 233 of the Laws of 1926, superseded by Chapter 678 of the Laws of New York, 1928). (R. 88) The portions of that statute relative to the perfection of said lien by the State and the

provisions for notice contained in the statute are summarized below, (a) to (f), for the convenience of the Court. References are to sections and subdivisions as numbered in the Laws of 1928, Chapter 678.

(a) The Public Service Commission is required to designate a program of grade crossing eliminations pursuant to hearings held on due notice "to the department of public works, the counties and other municipal corporations in which [the] crossings are located and the railroad corporations operating the railroad crossed." The compiled order "shall be served upon the department of public works, the comptroller, the counties and the railroad corporations affected thereby." [Section 2(3)]

(b) Provision is then made for issuance of an elimination order after a hearing upon "such notice as the commission shall deem reasonable, of not less than ten days, to the department of public works and to such railroad corporations and counties as are required by law to bear part of the cost of the elimination. Notice shall also be given to such other municipal corporations and persons deemed by the commission to be interested in the proceeding." The elimination order is required to be served upon the department of public works, the railroad and the counties affected. [Section 2(5)]

(c) A statement of costs is required to be filed by the Comptroller with the Public Service Commission, the railroad and the counties. [Section 4(2)]

(d) The Act provides for a hearing before the Comptroller prior to issuance by him of a final determination as to amounts due, etc. Notice is required to be served "on the railroad corporation or corporations and the county or counties." The Comptroller is required to serve a written

statement of his final determination "on the railroad corporation or corporations and the county or counties." [Section 4(2)]

(e) Section 7 provides that upon the hearing of any claim filed under the Act, notice of such claim shall be given to "the railroad corporation or corporations and the county or counties bearing a part of the cost of the elimination. . . ."

(f) Section 10 gives the right to apply for a hearing or rehearing and the right to appeal to "Any person aggrieved by any order or decision" provided such person was "a party to such proceeding."

7. Neither Bankers Trust Company, as Trustee under the Debtor's Refunding Mortgage, nor The New York Trust Company as Trustee under the Debtor's General Mortgage, ever received notice of hearings before the Commission or the Comptroller, nor did such Trustees ever receive a copy of any list, program, order, statement or Comptroller's notice of determination. (R. 92-95)

8. Published notices of hearings before the Public Service Commission to determine the necessity for various grade crossing eliminations appeared in local newspapers circulating in upstate towns. (R. 88-90) No other notice by publication was ever given in connection with the grade crossing elimination projects along the Debtor's line of railway. (R. 90)

Specification of Error.

The Circuit Court of Appeals has erred in holding that the State's lien enjoys priority over the liens of the Debtor's Refunding and General Mortgages.

Reasons for Application for the Writ.

1. The question is one of general public interest. The extent to which private rights may be invaded by state governments and the application of constitutional limitations protecting those rights are matters which call for judicial clarification by this Court.

2. The decision of the Circuit Court of Appeals sustains the right of a state under its police power to enact retroactive legislation which destroys vested property rights long since acquired, without regard to the constitutional guarantees of due process and just compensation and contrary to the constitutional prohibition against the impairment by a state of the obligation of contract.

3. There is a conflict, therefore, between the decision of the Circuit Court of Appeals and repeated pronouncements of this Court holding that the exercise of the police power is subject to restrictions imposed by the Federal Constitution.

4. What the Circuit Court of Appeals held to be constructive notice (151 F. (2d) 804; R. 124) was not legal notice either to the Mortgage Trustees or the bondholders, and was therefore inadequate from a constitutional point of view.

5. The holding of the Circuit Court of Appeals (151 F. (2d) at p. 804; R. 125) that personal notices to the mortgagor were appropriate since the mortgagees may be deemed to have relied on the mortgagor for the protection of their interests is unwarranted.

(a) Such reliance by the Mortgage Trustees would constitute a dereliction of their duty to the bondholders (mortgagees) which finds no basis in fact and which cannot be implied in law.

(b) Even if the Mortgage Trustees did, in fact, rely upon the mortgagor to protect the interests of the bondholders, notice to the mortgagor would not satisfy the requirements of due process guaranteed by the Constitution.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket No. 45, and that the order of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that Petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

Dated, January 31, 1946.

BANKERS TRUST COMPANY, as Trustee,

By JESSE E. WAID,
Counsel.

THE NEW YORK TRUST COMPANY, as Trustee,

By WALTER H. BROWN, JR.,
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Counsel.

INDEPENDENT GROUP OF BONDHOLDERS,

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BRIEF IN SUPPORT OF THE FOREGOING PETITION.

POINT I.

The decision below is in conflict with the principle laid down by this Court that the police power may be exercised only in harmony with constitutional principles.

This Court has refrained from defining with "circumstantial precision" the limitations imposed upon the states in the exercise of their police powers. (*Eubank* v. *Richmond*, 226 U. S. 137, 142 (1912).) That the police power is broad cannot be denied. This Court has repeatedly held, however, that the exercise of the power may not infringe upon rights guaranteed by the Constitution. "But necessarily it [the police power] has its limits and must stop when it encounters the prohibitions of the Constitution." *Eubank* v. *Richmond, supra,* at p. 142.

To the same effect, see *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902), where at page 558 the Court said:

> "But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived."

Buchanan v. *Warley,* 245 U. S. 60, 74 (1917), *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57, 69, 70 (1912), and *Lochner* v. *New York,* 198 U. S. 45, 56 (1905), are additional authorities for this proposition.

POINT II.

Decisions of this Court have protected obligations of contract against impairment by subsequent legislation. The decision below is in conflict.

Pursuant to the provisions of Chapter 676, Laws of New York of 1892, railroad corporations were given the authority from time to time to borrow money, issue bonds and to mortgage their property and franchises to secure the payment of such sums. The Debtor executed its Refunding Mortgage on June 1, 1892, and its General Mortgage on May 31, 1905. These mortgages were liens upon all the Debtor's property. Subsequently and in 1926, the legislature enacted Chapter 233 of the Laws of 1926 (superseded by Chapter 678 of the Laws of 1928), which recited that the amount expended by the State in grade crossing elimination shall be certified, apportioned, assessed and levied against the railroad and that "Any amount so levied shall thereupon become and be a first and paramount lien upon all real property of such railroad corporation * * *." [Laws of 1928, Chapter 678, §4(3)] At the date of enactment of the Grade Crossing Elimination Act, the liens of the Debtor's Refunding and General Mortgages constituted contractual obligations protected by Article I, Section 10, of the Federal Constitution against impairment by subsequent legislation.

In *Trustees of the Wabash and Erie Canal Co.* v. *Beers,* 67 U. S. 448 (1862), this Court held that the holder of bonds,

the issuance of which was authorized under a state statute, had a security for his debt which was protected by the provision in the United States Constitution which forbids a state to pass any law impairing the obligation of contracts. Speaking through Mr. Justice Miller, the Court said at page 452 that:

> "* * * the Legislature of Indiana (whatever it may have designed to do) could not divest that lien or postpone it to others, because it was the result of contract and was protected by the provision of the Constitution of the United States against impairing the obligation of contracts."

In *Toledo, Delphos and Burlington Railroad Co.* v. *Hamilton,* 134 U. S. 296 (1890), this Court reiterated the principle that a state legislature is without power to subordinate liens acquired prior to enactment of a statute. Speaking with reference to a mechanic's lien under the Ohio law, the Court said, at page 301:

> "* * * There was no statute in force at the time the mortgage was executed, giving any priority to subsequent mechanics' liens, and by the mortgage the mortgagee took its vested priority, beyond the power of the mortgagor or the legislature thereafter to disturb."

In *Savings Society* v. *Multnomah County,* 169 U. S. 421 (1897), on page 428, this Court stated:

> "This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate. *United States* v. *Hooe,* 3 Cranch, 73; *Thelusson* v. *Smith,* 2 Wheat. 396, 426; *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386, 441."

See, also, *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, (1934), where this Court held void under the contract clause of the Constitution an Arkansas statute exempting from judicial process the proceeds of life insurance policies because the Arkansas courts had construed the statute as divesting a garnishment lien previously acquired.

POINT III.

Procedural due process demands that notice and an opportunity to be heard be given before the State can deprive a person of his property.

This Court has held that the interest of a mortgagee in the protection of his security against impairment is a valuable property right safeguarded by our Federal Constitution. (*Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935)). The holding of the Circuit Court of Appeals that the Grade Crossing Elimination Act itself was notice to the mortgagees is not sustainable on the authority of this Court's decision in *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 243 (1944), and such notice, therefore, was not in fact legal notice either to the Mortgage Trustees herein or to the bondholders. The statute under consideration in the *Anderson* case did contain a provision for notice to bank depositors and the question was presented as to the sufficiency of the method designated for giving notice. The vice of the Grade Crossing Elimination Act consists in its failure to provide for any notice whatever to mortgagees. In this respect it violates the test laid down by this Court in the *Anderson* case (*supra*) at page 246, that: "The fundamental requirement of due process is an opportunity to be heard upon such notice and

proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

Nor can the vice be cured by notice to the railroad as intimated in the opinion below. The duty of the Mortgage Trustees to protect the security of the mortgages on behalf of the bondholders is a non-delegable fiduciary duty and one which the Mortgage Trustees did not in fact, nor by reasonable implication entrust to the mortgagor railroad.

The notice by publication was not prescribed by the statute and was not competent to bind the Mortgage Trustees since actual notice was necessary. *Burck* v. *Taylor,* 152 U. S. 634, 654 (1894).

POINT IV.

Substantive due process under the Fourteenth Amendment prohibits the taking by a State of private property for public use without just compensation.

The Court has held that the due process clauses of the Fifth and Fourteenth Amendments safeguard private property against a taking by the nation or a state respectively for public use without just compensation. *West, et al.* v. *Chesapeake and Potomac Telephone Co. of Baltimore,* 295 U. S. 662 (1935).

It has also held that the right of a mortgagee to have the mortgaged premises applied exclusively to the satisfaction of his mortgage debt was a substantive property right of which the mortgagee could not constitutionally be deprived without compensation, by an Act of Congress relating to pre-existing mortgages. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935).

It is submitted that the decision of the Circuit Court of Appeals by granting priority to the State's lien over the

Debtor's pre-existing mortgage liens deprives the mortgagees of their rights to have the mortgaged property devoted exclusively to the satisfaction of the mortgage debt. Since the Grade Crossing Elimination Act provides no compensation to mortgagees for such taking, it is unconstitutional and the failure of the Circuit Court so to hold renders its decision in conflict with the decisions of this Court.

Conclusion.

The writ of certiorari should be granted as prayed.

Dated, January 31, 1946.

Respectfully submitted,

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(7670)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

The petitioners pray for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit entered on November 5, 1945 (R. 128), which decree affirmed an order, dated April 25, 1945, made by the United States District Court for the Southern District of New York. (R. 6.)

Pursuant to the District Court order and the opinion of the Circuit Court of Appeals it was determined that the State of New York, (hereinafter called the State), had a valid lien against the real property of the New York, Ontario and Western Railway Co., Debtor, (hereinafter called the Debtor), for the amounts due on past due installments under the Grade Crossing Elimination Act and that the

lien of the State of New York for the aforesaid moneys was prior to the lien of the mortgage bondholders. (R. 122, *et seq.*).

Many of the matters involved in this petition were previously before this Court.

> *Lyford* v. *State of New York,* 140 F. 2d 840, certiorari denied, *sub nom.*
> *Bankers Trust Co.* v. *People of the State of New York,* 323 U. S. 714.

The Circuit Court of Appeals on the prior appeal had held that the moneys due from the Debtor for its share of the cost of grade crossing eliminations were in the nature of a tax and that the State had a valid lien therefor on the real property of the Debtor.

On that appeal both the District Court and the Circuit Court of Appeals reserved for future determination the question of the priority of the State's lien over pre-existing mortgages of the Debtor. (R. 102.) The State then moved in the District Court to conform the proceedings therein with the decision of the Circuit Court of Appeals, and for a further order directing the Trustees to pay the past due installments under the Grade Crossing Elimination Act and upon their failure to do so to assess and apportion its lien. The District Court denied the State's motion to direct the Trustees to pay upon the ground that the financial condition of the Debtor would not permit it at this time, but did permit the State to assess and apportion its lien for unpaid installments and held further that the State's lien should be prior to the lien of the pre-existing mortgages. This decision was affirmed by the Circuit Court of Appeals. (R. 121.) It is from this decision that the petitioners seek the writ of certiorari.

Facts

1. The Debtor operates a railroad extending from Weehawken, New Jersey to Oswego, New York. The portion of the Debtor's railroad within the State of New York was operated under a franchise from the Legislature of the State of New York. (R. 102.)

2. By authority of a 1925 amendment to the Constitution of the State of New York, (Art. VII, Section 14), which amendment was adopted by the State of New York at a general election held after the proposed amendment had been duly advertised pursuant to Section 80 of the New York Election Laws, (R. 123), the Legislature adopted what is known as the Grade Crossing Elimination Act. (Laws of 1926, Chapter 233, superseded by Laws of 1928, Chapter 678; McKinney's Unconsolidated Laws, Sections 7901-12.) Pursuant thereto the Debtor in common with other railroads was required to eliminate certain grade crossing and to pay fifty percent of the cost of the eliminations. (Unconsolidated Laws, Section 7903.)

The Act further provided that if the railroad so elected the State would pay the railroad's share of the cost of the elimination in the first instance and the railroad would then be obliged to pay its share of the cost in installments and upon the default of payment of any installments the State would have a first and paramount lien for the amount of the default against the real property of the railroad located in the County wherein the grade crossing elimination had been performed. (Unconsolidated Laws, Section 7904, Sub. 1, 2, 3.)

3. The orders requiring the grade crossing elimination were made by the Public Service Commission after due compliance with all of the statutory requirements of the Grade

Crossing Elimination Act. Pursuant to the provisions of Subdivision 2 of Section 2, (Section 7902 Unconsolidated Laws), the Department of Public Works filed a list of the crossings, the elimination of which it suggested, to be considered by the Public Service Commission during the following year, and the estimated cost thereof. The Public Service Commission, on due notice to the Department of Public Works, the counties and the railroad corporations, then held public hearings to determine what crossings were to be included in its program of eliminations to be considered by the Commission during the ensuing year. In all instances involved in this appeal the Debtor appeared at such public hearings and elected in writing to avail itself of State funds for its share of the cost of the elimination. (R. 88.)

Thereafter, pursuant to the provisions of Subdivision 5 of Section 2, (Unconsolidated Laws 7902), before ordering any particular elimination on the foregoing program the Public Service Commission held public hearings to determine whether the public welfare required the elimination of the crossing. Notice of these hearings was given to the Debtor by mail and to all other persons who might have an interest in the proceeding by advertisements in daily newspapers published in the County wherein the eliminations were to be performed. (R. 88, 90.) The debtor appeared and was represented at all such public hearings.

4. In a number of instances appeals were taken by the Debtor from the foregoing orders of the Public Service Commission, which appeals were taken pursuant to the provisions of Section 10 of the Grade Crossing Elimination Act, (Section 7910 Unconsolidated Laws), which section granted to any person aggrieved by the order of the Commission

the right to appeal to the Appellate Division and the Court of Appeals of the State of New York.

(Matter of New York, Ontario & Western Ry. Co., 244 App. Div. 664, aff'd, 271 N. Y. 567).

The Opinions Below

This case involves two primary questions, the first as to whether the elimination of grade crossings is a valid use of the police power of the State, and second as to whether the Grade Crossing Elimination Act makes proper provision for notice to interested persons.

The first question was not raised in the District Court, but in respect to the question of notice the District Court held that the provisions of the statute affecting the notice were adequate in that personal service had been given to the Debtor and notice by publication to any other person who might be interested in the proceeding. The District Court further stated that it would seem that the mortgagees were put on notice to examine into proceedings that required an amendment of the State Constitution followed by the appropriation and investment of three million dollars of the State's money (R. 19, 20). The District Court also held that the installments of the Debtor's share of the grade crossing eliminations were payable as taxes and as such were expenses of administration and by reason thereof would have priority over the mortgages. (R. 19.)

The Circuit Court of Appeals on appeal by the petitioners herein held that the Grade Crossing Elimination Act did not impair the obligations of the appellant's mortgage contracts within the constitutional prohibition, as grade crossing eliminations have long been accepted as a valid exercise of the police power. (R. 126.)

In regard to the question of notice the Circuit Court held that notice by publication was clearly adequate notice to the mortgagees, (R. 124), and that in addition thereto the statute itself was also notice to them. (R. 123.)

ARGUMENT

POINT I

Petitioners' mortgage contracts were subject to a valid exercise of the police power of the State.

The principle is firmly established today that all contracts are subject to the police power of the State and when public welfare requires the modification of private contractual obligations in the public interest the rights of the individual must yield to legislation addressed to a legitimate end.

Twentieth Century Associates, Inc. v. *Waldman,* 294 N. Y. 571, App. dismissed, U. S. Supreme Court, January 28, 1946 .... U. S. ....;

Block v. *Hirsch,* 256 U. S. 135;

Marcus Brown Holding Co. v. *Feldman,* 256 U. S. 170;

Manigault v. *Springs,* 199 U. S. 473;

Louisville & Nashville, R. Co. v. *Mottley,* 219 U. S. 467.

This Court has repeatedly held that the elimination of grade crossings is one of the highest uses of the police power.

Erie R. R. Co. v. *Board of Public Utilities Comm.,* 254 U. S. 394;

Denver & Rio Grande R. R. Co. v. *Denver,* 250 U. S. 241;

Missouri K. & T. Rwy. Co. v. *Oklahoma,* 271 U. S. 303;
Missouri Pacific Rwy. Co. v. *Omaha,* 235 U. S. 121;
In re Panhandle Eastern Pipe Line Co., 294 U. S. 613.

Therefore, the contractual rights of the individual are subordinate to the public welfare of the citizens of the State of New York in carrying out the statutory provisions of the Grade Crossing Elimination Act.

POINT II

The State had full power to create a first and paramount lien on the real property of the debtor to secure payment of its indebtedness.

The right of the State to create a lien for the debts due it stems from the prerogative right at common law which gave the British Crown priority over all subjects for payment out of a debtor's property of all debts due it.

The first Constitution of the State of New York (adopted in 1777) provided that the common law of England, which together with the statutes constituted the law of England on April 19, 1775, should be and continue the law of the State subject to such alterations as its Legislature might thereafter make. This provision has been embodied in substance in every Constitution of the State since and by virtue thereof the people have succeeded to the Crown's right of priority.

Matter of Carnegie Trust Co., 151 App. Div. 606, aff'd, 206 N. Y. 390;
Marshall v. *State of New York,* 254 U. S. 380.

With the power to create a lien goes likewise the power to create a lien paramount and prior to existing liens.

> *New York Terminal Co.* v. *Gaus*, 204 N. Y. 512.
> *Lyford* v. *State of New York*, 140 F. 2d 840, cert. denied *sub nom. Bankers Trust Co.*, v. *State of New York*, 323 U. S. 714.

The mortgagees were fully aware when their mortgages were placed, that the railroad which they covered was operated under a franchise from the State. (R. 102.) There is no conceivable constitutional basis for holding that a mortgage loan on such a franchise should be given precedence over obligations which the Legislature imposes as a condition of such franchise, for the purpose of protecting the public from dangers created by the operation of railroads.

No clearer expression of Legislative intent to create a first and paramount lien could be found than the language used in Subdivision 3 of Section 4 of the Grade Crossing Elimination Act. (Section 7904, Unconsolidated Laws):

> "Any amount so levied shall thereupon become and be a *first and paramount lien* upon all real property of such railroad corporation or corporations or the successor or successors thereof within such respective towns and cities". (Italics ours.)

The Circuit Court of Appeals in the previous appeal herein has held that the debt was in its nature a tax.

Lyford v. *State of New York, supra.*

So that whether the prior lien is determined to be created as a result of an exercise of the taxing power or of the police power it was not a taking of property without compensation within the meaning of the Constitution.

POINT III

The petitioners received adequate notice of all proceedings for the elimination of the grade crossings involved herein.

The Grade Crossing Elimination Act provided ample opportunity for any interested person to be heard in favor of or in opposition to any proposed elimination, and the statute also afforded a right of appeal from the decisions of the Public Service Commission. (Unconsolidated Laws, Sections 7902, 7910.)

Notice of the public hearings held by the Commission was given by mail to the Debtor and to all other interested persons by publication of the notice of hearings in a daily newspaper published in the counties wherein the contemplated eliminations were located. (R. 89, 90.) These hearings did not take place in a single day, but extended from the period of July 1, 1926 to April 7, 1935. (R. 89, 90.)

The statute itself was notice to the mortgagees and all other interested persons of the procedures thereunder.

> *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 243.

Personal notice of these hearings was not required, as notice by publication has uniformly been held to be adequate.

> *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276;
> *Huling* v. *Kaw Valley Rwy. & Improvement Co.,* 130 U. S. 559;
> *Bragg* v. *Weaver,* 251 U. S. 57;
> *Lamb* v. *Connolly,* 122 N. Y. 531, 25 N. E. 1042;
> *Matter of Depester,* 80 N. Y. 565;
> *People ex rel. Bridgeport Savings Bank* v. *Feitner,* 191 N. Y. 88.

The procedure provided for under the Grade Crossing Elimination Act was neither arbitrary nor unjust. It provided a reasonable opportunity to be heard in protest and also afforded a right of appeal. The statute, accordingly, met all of the tests of due process of law.

Hagar v. *Reclamation District No. 108,* 111 U. S. 701, 708.

Conclusion

We respectfully submit that this cause provides no question warranting review by this Court, and urge that the petition be denied.

Dated: February 21, 1946.

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